BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

HERIBERTO VALENZUELA	)	
Claimant	)	
V.	)	
	)	
BASIC ENERGY SERVICES, LP	)	Docket No. 1,065,257
Respondent	)	
AND	)	
	)	
LIBERTY INSURANCE CORPORATION	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the August 5, 2013 preliminary hearing Order Denying Medical Treatment (Order). Cody G. Claassen of Wichita, Kansas, appeared for claimant. John D. Jurcyk of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The preliminary hearing Order indicated claimant recklessly violated respondent's safety rules and denied claimant's request for benefits pursuant to K.S.A. 44-501(a)(1)(D).

The record on appeal is the same as that considered by the administrative law judge and consists of the transcript of the August 2, 2013 preliminary hearing and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

Claimant argues that he did not recklessly violate any safety rules. Claimant requests the Board reverse the Order and award benefits.

Respondent maintains that the Order should be affirmed, further arguing the accident was not the prevailing factor in causing claimant's injury, medical condition, and resulting disability, and also that claimant is not entitled to temporary benefits because he was terminated for cause, namely due to a safety violation.

The issue for the Board's review is:

Should benefits be disallowed due to claimant's reckless disregard of respondent's safety rules?

FINDINGS OF FACT

Claimant worked for respondent for approximately one year and seven months as a pump driver. Upon starting work with respondent, claimant signed an acknowledgment form that he received a copy of the Employee Policy Handbook. He also received a copy of the Employee Safety Handbook. Claimant testified that although he was unable to read or write English, he knew it was unsafe to work on machinery that was moving. Additionally, as part of his safety training, claimant took quizzes on March 27, 2012 and February 19, 2013, regarding the importance of locking and tagging out machinery prior to working on them, as well as preventing hand injuries.

On November 2, 2012, claimant was reprimanded for violating safety rules relating to wearing safety glasses. A disciplinary action notice was completed. On December 7, 2012, claimant received a second disciplinary action notice stating "attitude is affecting job performance and duties."[1]

According to claimant's testimony, on March 26, 2013, he was repackaging a pump when his supervisor, Ismael Chavez, and a coworker, Hector Rutiaga, inquired what still needed to be done. Claimant told them he needed to do just a few more things and turn on the "device."[2] Claimant testified "the other tool grabbed [his] hand"[3] and he was injured when Mr. Chavez suddenly, and without warning, turned on the device while his left hand was inside. Claimant's hand was crushed after being grabbed by the moving parts of the pump. Claimant testified he was performing work like he had been trained to do, he believed he was following all safety rules and he was not trying to hurt himself. Claimant testified that Mr. Chavez knew he was working on the pump when Mr. Chavez turned on the pump. Claimant denied any conversation with Mr. Chavez before the pump was turned on.

Mr. Chavez testified they had reached the final stage where they needed to check to see if the oil was flowing. In order to have oil flowing, air had to be built up which required the pump engines to be turned on. Prior to turning on the pump engines, Mr. Chavez had a conversation with claimant and Mr. Rutiaga in Spanish.[4] Mr. Rutiaga was standing in front of the pump to monitor when the oil was flowing, and claimant was sitting on a ledge between two pumps awaiting the next step. Mr. Chavez went to an area above and turned on the pump engines. Mr. Chavez testified the pump engines had been

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[1] P.H. Trans., Resp. Ex. 2 at 2.

[2] P.H. Trans. at 7. It appears, but is not entirely clear, that the "device" was the same thing as the pump.

[3] *Id.*

[4] Mr. Chavez speaks fluent Spanish and indicated he "never had an issue" with claimant understanding him in the year that they worked together. P.H. Trans. at 19-20.

running for at least 30 seconds when he observed claimant stick his hand in the pump. Mr. Chavez believed claimant got impatient and checked to see if oil was flowing. Mr. Chavez described claimant's hand as being caught by a "plunger."[5] Mr. Chavez testified that he witnessed the entire incident and denied that claimant's hand was already inside the machinery when he turned on the pump engines. Mr. Chavez noted that he and the other two workers had repacked pumps on eight to 10 prior occasions.

Mr. Rutiaga testified that Mr. Chavez advised him and claimant in advance that he was going to turn on the pump engines.

Claimant was terminated on April 4, 2013, for multiple safety violations.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501 states in part:

> (a) (1) Compensation for an injury shall be disallowed if such injury to the employee results from:
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> (A) The employee's deliberate intention to cause such injury;
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> (B) the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;
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> (C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;
>
> (D) the employee's reckless violation of their employer's workplace safety rules or regulations . . . .

K.S.A. 2012 Supp. 44-501b(c) states:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(h) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

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[5] P.H. Trans. at 18.

K.A.R. 51-20-1 provides:

> The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

"Recklessness is a lesser standard of conduct than intentional conduct and requires running a risk substantially greater than the risk which makes the conduct merely negligent or careless."[6] While "the term recklessness is not self-defining," the common law has generally understood it in the sphere of civil liability as conduct violating an objective standard: action entailing "an unjustifiably high risk of harm that is either known or so obvious that it should be known."[7]

In *Wiehe*,[8] the Kansas Supreme Court quoted Restatement (Second) of Torts § 500(a) (1965), pp. 587-588:

> **Types of reckless conduct**. Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.
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> For either type of reckless conduct, the actor must know, or have reason to know, the facts which create the risk. . . .
>
> For either type of conduct, to be reckless it must be unreasonable; but to be reckless, it must be something more than negligent. It must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent. It must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence.

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[6] *Robbins v. City of Wichita*, 285 Kan. 455, 470, 172 P.3d 1187, 1197-98 (2007) (paraphrasing *Safeco Ins. Co. America v. Burr*, 551 U.S. 47, 69, 127 S.Ct. 2201, 2215, 167 L.Ed.2d 1045 (2007) (citing, *inter alia*, Restatement [Second] of Torts § 500, p. 587 [1963-1964])).

[7] *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 68, 127 S. Ct. 2201, 2215, 167 L. Ed. 2d 1045 (2007) (citing *Farmer v. Brennan*, 511 U.S. 825, 836, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)).

[8] *Wiehe v. Kukal*, 225 Kan. 478, 483-84, 592 P.2d 860 (1979).

Kansas criminal law defines reckless conduct in K.S.A. 2011 Supp. 21-5202(j):

> A person acts "recklessly" or is "reckless," when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

ANALYSIS

This Board Member agrees that claimant recklessly violated a safety rule.

Recklessness contemplates something beyond ordinary negligence or carelessness. To conclude claimant acted with recklessness, the preponderance of the credible evidence must support his conscious disregard of a known or obvious risk that exceeds negligence. Recklessness is akin to gross, culpable or wanton negligence, but is a lesser standard than intentional conduct. Here, claimant knew he was not to put his hand in moving machinery, but did so anyway. Claimant's version of events – that the machine was off when he stuck his hand in it and that he had no idea the machine was going to be turned on – is contrary to statements by Mr. Chavez and Mr. Rutiaga. Rather, the machine had been running for 30 seconds before claimant put his hand in the machinery. Under claimant's version of events, Mr. Chavez turned on the pump engines, fully knowing that claimant's hand was in the pump; this allegation is not supported by the evidence. While there is no doubt that claimant did not want to hurt himself, his action was a reckless violation of a safety rule, putting his hand in moving machinery, a known and obvious danger.

CONCLUSIONS

WHEREFORE, the undersigned Board Member affirms the August 5, 2013 Order Denying Medical Treatment.[9]

IT IS SO ORDERED.

Dated this _____ day of September, 2013.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

[9] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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Honorable Pamela J. Fuller